

No. 78-872

Supreme Court, U. S.

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IN THE
Supreme Court of the United States
OCTOBER TERM, 1978

ATCHISON, TOPEKA & SANTA FE
RAILWAY CO., *et al.*

Petitioners.

v.

NATIONAL ASSOCIATION OF RECYCLING
INDUSTRIES, INC., *et al.*

Respondents.

**MEMORANDUM IN SUPPORT OF PETITION
FOR WRIT OF CERTIORARI TO THE UNITED
STATES COURT OF APPEALS FOR THE
DISTRICT OF COLUMBIA CIRCUIT**

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Respondent, American Paper Institute, Inc. (API)¹, hereby files its Memorandum in support of the Petition for Writ of Certiorari to the United States Court of Appeals for

¹API is a national trade association of the pulp, paper and paper-board industry. API's members provide more than 90% of the nation's output of these products. API members utilize wood pulp, pulpwood, wood chips and waste paper. The paper industry is the ultimate consumer of most waste paper being utilized in the United States.

API intervened in support of the Interstate Commerce Commission in Docket No. 77-1187, *National Association of Recycling Industries, Inc., v. United States of America and Interstate Commerce Commission* before the United States Court of Appeals for the District of Columbia Circuit.

the District of Columbia Circuit filed on behalf of Atchison, Topeka & Santa Fe Railway Co., et al. (the railroads) on or about November 30, 1978.

Respondent adopts, for purposes of this Memorandum, the material in the railroads' Petition under the headings "Opinions Below," "Jurisdiction," "Questions Presented," "Statute Involved," and "Statement Of Facts."

ARGUMENT

The Petition For Writ Of Certiorari fully and adequately sets forth the two basic issues which are raised by the lower court's decision. Stated briefly, the lower court has usurped the authority of the Interstate Commerce Commission (Commission), both substantively and procedurally. It has stepped beyond the bounds of proper judicial review and has propelled itself "into the domain which Congress has set aside exclusively for the administrative agency."²

In reviewing the decision of the Interstate Commerce Commission in Ex Parte 319, *Investigation of Freight Rates Recyclable Commodities* the lower court did not limit itself to determining whether the decision of the Commission was "arbitrary, capricious, a clear abuse of discretion" or otherwise unlawful within the meaning of 5 U.S.C. §706. Rather, the court took it upon itself to reassess and reweigh the evidence before the Commission and to second guess the Commission's analysis of that evidence. In so doing, the court totally ignored the clear teachings of this Court as to

² *Securities and Exchange Com. v. Chenery Corporation*, 332 U.S. 194, 196 (1947)

the proper scope of judicial review of administrative agency decisions.³

The magnitude of the lower court's error is compounded by the fact that it apparently felt compelled to intervene not only substantively, but also procedurally, in the agency's decision-making process. Not only did the court give rather explicit directions as to the evidence to be adduced and the conclusions to be reached in the proceedings on remand (Pet. App. 43b-44b, 44b n. 87), it also dictated the time frame within which the Commission must complete those proceedings. This was done without consulting the agency to determine whether the time frame mandated by the court was reasonably sufficient to allow the Commission to complete its proceedings and without any indication that the Commission would not act expeditiously on the remanded proceedings absent such a directive by the court. No basis exists for the court's interference with the procedural prerogatives for the Commission. The lower court has entered into an area which has properly been reserved to the agency.⁴

This case is significant for two reasons. The first is the complete failure of the lower court to recognize the boundaries of administrative agency discretion, within which the reviewing courts are not permitted to tread. The lower court has substituted its judgment for that of the agency in vir-

³ *Bowman Trans. v. Arkansas-Best Freight*, 419 U.S. 281 (1974); *Citizens To Preserve Overton Park v. Volpe*, 401 U.S. 402 (1971); *Burlington Truck Lines v. United States*, 371 U.S. 156 (1962); *United States v. Pierce Auto Freight Lines*, 327 U.S. 515 (1946)

⁴ See *FPC v. Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 333 (1976); *FCC v. Schreiber*, 381 U.S. 279 (1965); *Federal Communications Comm'n. v. Pottsville Broadcasting Co.*, 309 U.S. 134 (1940).

tually every aspect of the Commission's proceedings. It has reweighed and reevaluated the evidence. It has established the procedural frame within which the Commission must act. And, it has given strong indications as to what it considers the appropriate outcome on remand to be. Each of these factors is significant in and of itself. The combination of these factors is of sufficient importance to warrant the granting of the Petition For Writ Of Certiorari.

The second important aspect of this case is the magnitude of the impact of the decision. At issue in this proceeding is the freight rate structure underlying the rail transportation of numerous virgin and recycled materials, including wood pulp, pulpwood, wood chips and waste paper, which are essential to this nation's commerce. It is not a single rate or a single commodity which is at issue here. Rather, it is an entire rate structure on a broad range of commodities. Long-standing rate relationships around which business practices have developed may be seriously disrupted.

The industries which will be affected, including the paper industry, are vitally important to this country's economy and disruptions in their operations will have a ripple effect throughout the economy. The paper industry, which is only one of the major industries affected, is among the ten largest industries in the United States. A disruption of the rate structure under which the products of that industry are shipped will have substantial repercussions.

CONCLUSION

For the reasons set forth above, it is respectfully submitted that the Petition For Writ Of Certiorari should be granted.

Respectfully submitted,

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